

# Decisions of Interest

JULY 10, 2023

## CRIMINAL

### SECOND DEPARTMENT

#### ***People v Alvarenga*** | July 5, 2023

INEFFECTIVE ASSISTANCE OF COUNSEL | NEW TRIAL

The defendant appealed from a Queens County Supreme Court judgment convicting him of 2<sup>nd</sup> degree murder and 2<sup>nd</sup> degree CPW (2 counts) after a jury trial. The Second Department reversed and remitted for a new trial. The cumulative effect of trial counsel's errors deprived the defendant of the effective assistance of counsel. Counsel failed to: object when the People elicited proof about a non-testifying accomplice's plea agreement; timely request a missing witness charge as to the non-testifying accomplice; and request any accomplice instruction regarding the testimony of the People's principal witness. Further, Supreme Court erred when it told prospective jurors during voir dire not to change their minds about whether they could be impartial based on the attorneys' questions, and that their feelings about the police department were irrelevant to the court. Appellate Advocates (Cynthia Colt, of counsel) represented the appellant.

[People v Alvarenga \(2023 NY Slip Op 03704\)](#)

#### ***People v Ramos*** | July 5, 2023

IMPROPER POLICE OPINION | VIDEO | PARTIAL REVERSAL

The defendant appealed from a Nassau County Supreme Court judgment convicting him of 1<sup>st</sup> degree assault (2 counts), 1<sup>st</sup> and 2<sup>nd</sup> degree gang assault, 3<sup>rd</sup> degree CPW, and 3<sup>rd</sup> degree witness intimidation after a jury trial. The Second Department vacated the 1<sup>st</sup> degree assault, 1<sup>st</sup> degree gang assault, and CPW convictions and ordered a new trial on those counts. Supreme Court should have precluded a detective's opinion testimony regarding what was depicted in a video of the assault on one of two victims. The detective improperly narrated the video, gave his interpretation of the video—which was not necessarily supported by the video—and instructed the jury about the presence of facts needed to meet the elements of the charged crimes. Michael Alber represented the appellant.

[People v Ramos \(2023 NY Slip Op 03709\)](#)

#### ***People v Pointer*** | July 5, 2023

NO LEGAL BASIS | NOT ADVERSE POSITION

The defendant appealed from an Orange County Court judgment convicting him of manufacture, transport, disposition, and defacement of weapons and dangerous

instruments and appliances based on his guilty plea. The Second Department affirmed. Prior to sentencing, the defendant filed a pro se motion seeking to withdraw his guilty plea. At sentencing, County Court asked defense counsel whether he was adopting the defendant's pro se motion to withdraw his plea and whether there was any legal basis to not move forward with sentencing. Defense counsel's statement that he was not adopting the motion and was "not aware of a legal basis" to delay sentencing did not constitute an expression of his opinion as to the merits of the motion. Thus, the defendant was not denied meaningful representation on his motion to withdraw his guilty plea.

[People v Pointer \(2023 NY Slip Op 03711\)](#)

## THIRD DEPARTMENT

***People v Lundy*** | July 6, 2023

CONSPIRACY | MAJOR DRUG TRAFFICKER | LEGALLY INSUFFICIENT

The defendant appealed from a Sullivan County Court judgment convicting him of 2<sup>nd</sup> degree conspiracy and 3<sup>rd</sup> degree CPCS (two counts) after a jury trial. The Third Department reversed the conspiracy conviction, dismissed that count, and otherwise affirmed. The conspiracy conviction—based upon the underlying crime of operating as a major trafficker—was not supported by legally sufficient evidence. The evidence showed only that the defendant purchased dealer quantities of cocaine and cooked crack for his supplier; it did not connect the defendant to the supplier's broader cocaine dealing network. The proof did not set forth a valid line of reasoning to infer that the defendant specifically intended to engage in conduct constituting the administration, organization, or leadership of a controlled substance organization. Nor did the People establish that the drug organization collected proceedings of \$75,000 or more. Mitchell S. Kessler represented the appellant.

[People v Lundy \(2023 NY Slip Op 03727\)](#)

## FOURTH DEPARTMENT

***People v Ramos*** | July 6, 2023

MURDER | ACCESSORIAL LIABILITY | AGAINST WEIGHT

The defendant appealed from an Erie County Supreme Court judgment convicting him of 2<sup>nd</sup> degree murder and 2<sup>nd</sup> degree CPW. The Fourth Department reversed and dismissed the indictment. The verdict was against the weight of evidence. The conviction was based on the defendant's alleged accessorial liability for a fatal shooting at a bar. The People's case consisted of proof that he may have dropped off the codefendant near the bar before the shooting and the testimony of a jailhouse informant about his purported confession. Such account—which was at odds with video evidence and was too specific for the inconsistency to be innocuous—was not credible. The proof simply did not support the inference that the defendant shared the codefendant's criminal intent. The Legal Aid Bureau of Buffalo (Susan Hutchison, of counsel) represented the appellant.

[NOTE: The Statewide Appellate Support Center is available to moot counsel for oral arguments. We thank LAB for inviting us to do our first moot court in this case.]

[People v Ramos \(2023 NY Slip Op 03755\)](#)

## TRIAL COURTS

### ***People v Martinez*** | 2023 WL 44359517

30.30 | ELECTRONIC FILING | MOTION DENIED

The defendant moved to dismiss misdemeanor charges on statutory speedy trial grounds after the People filed their COC and SOR electronically at 5:54 p.m. on the 90<sup>th</sup> day following arraignment. Bronx County Criminal Court denied the motion. CPL 30.30 (1) (b) quantifies the People's speedy trial obligation in days, not hours. EDDS does not require in-person filing with the court clerk and allows submissions to be filed at any hour. There is no statutory requirement that a statement of readiness must be made during business hours.

[People v Martinez \(2023 NY Slip Op 23194\)](#)

### ***People v Hidalgo*** | 2023 WL 4359571

BRUEN | AGE RESTRICTIONS | CONSTITUTIONAL

The defendants moved to, among other things, dismiss indictments charging them with CPW 2<sup>nd</sup> based on *New York State Rifle & Pistol Ass'n v Bruen* (143 S Ct 2111 [2022]) and the Second and Fourteenth Amendments. Bronx County Supreme Court denied the motion to dismiss. *Bruen* struck down the "proper cause" requirement for "law-abiding" concealed carry permit applicants; it did not address who may lawfully possess a firearm. The provisions prohibiting a person between the ages of 18 and 20 from obtaining a firearms license are consistent with historical tradition of firearm regulation. *Bruen* did not confirm an unqualified entitlement to possess deadly weapons in public places without restriction.

[People v Hidalgo \(2023 NY Slip Op 23197\)](#)

## FAMILY

## THIRD DEPARTMENT

### ***Matter of Willow K. (Victoria L.)*** | July 6, 2023

TPR | NOT DILIGENT EFFORTS | REVERSED

The mother appealed from a Chemung County Family Court order that granted the permanent neglect petition and terminated her parental rights. The Third Department reversed. DSS did not make diligent efforts toward reunification that were sufficiently tailored to the mother's needs, given her behavioral disorders and cognitive disability. The mother's limitations were never accurately ascertained to determine the appropriate level of mental health treatment. The visitation coach frequently canceled the mother's supervised visits and made no effort to teach parenting skills in a way the mother could understand. The mother lived in an apartment complex for disabled adults; the caseworker refused to help her find housing where the children could reside. The mother was referred to a parenting course provider that rejected her from its program; the caseworker never referred her to an alternative program. Pamela B. Bleiwas represented the appellant.

[Matter of Willow K. \(Victoria L.\) \(2023 NY Slip Op 03730\)](#)

### ***Matter of Zachary L.*** | July 6, 2023

JD | SPEEDY TRIAL | REVERSED

The respondent appealed from a Broome County Family Court order that adjudicated him a juvenile delinquent. The Third Department reversed. The speedy trial requirements relative to JD proceeding were violated. The first day of fact-finding was scheduled 273 days after the respondent's initial appearance. During that period, Family Court referred the respondent to the probation department for an adjustment period, which tolled the speedy trial clock for 153 days. The remaining 120-day delay far exceeded the maximum 90-day speedy trial period (assuming a 30-day adjournment had been properly granted). Mitchell S. Kessler represented the appellant.

[Matter of Zachary L. \(2023 NY Slip Op 03735\)](#)

***Matter of Tashawn MM.*** | July 6, 2023

JD | DEFECTIVE ALLOCUTION | REVERSED

The respondent appealed from a Tompkins County Family Court order that adjudicated him a juvenile delinquent. The Third Department reversed. The respondent admitted to having committed acts constituting 4<sup>th</sup> degree CPSP. Family Court placed him in OCFS custody for 12 months, and the Third Department stayed the dispositional order pending appeal. The respondent's allocution was fatally defective because Family Court failed to comply with Family Ct Act § 321.3 (1). Family Court commented on possible dispositions, including being placed outside of his home for a period of time. But neither the respondent nor his mother were informed of the exact nature or duration of the potential placement. Citizens for Concerned Children, Inc. (Thomas G. Shannan, of counsel) represented the appellant.

[Matter of Tashawn MM. \(2023 NY Slip Op 03745\)](#)

***Matter of Lauren X. (Daughn X.)*** | July 6, 2023

NEGLECT | VOLUNTARY DISMISSAL | REVERSED

The AFC appealed from a Delaware County Family Court order that granted DSS's motion to withdraw its neglect petition against the mother. The Third Department reversed. Family Court erred in granting DSS's application without allowing time for objections. The parties (including the nonrespondent father) should have been given an opportunity to present arguments concerning the application, such as the potential effect on the child's welfare, whether prejudice should attach, or if another party should be permitted to commence a neglect proceeding.

[Matter of Lauren X. \(Daughn X.\) \(2023 NY Slip Op 03732\)](#)

***Matter of Samuel S. (Amber V.—Lindsay U.)*** | July 6, 2023

POSTADOPTION AGREEMENT VIOLATION | NO CAUSE OF ACTION

The mother appealed from a Tompkins County Family Court order granting the AFC's motion to dismiss her petition seeking to revoke the court-approved postadoption contact agreement and judicial consent to adoption based on the pre-adoptive parents' alleged noncompliance. The Third Department affirmed. Family Court Act § 1055-a (b) provides for the enforcement of postadoption contact agreements; it does not provide a mechanism for revocation. Moreover, failure to abide by a postadoption contact agreement "shall not be grounds for . . . revocation of written consent to an adoption after that consent has been approved by the court" (DRL § 112-b [3]).

[Matter of Samuel S. \(Amber V.—Lindsay U.\) \(2023 NY Slip Op 03728\)](#)

***Matter of Lawyers for Children v NYS OCFS*** | July 6, 2023

CPLR ARTICLE 78 | ORGANIZATION STANDING | REVERSED

In this CPLR article 78 proceeding, the petitioners appealed from a Rensselaer County Supreme Court judgment that granted the respondent’s pre-answer motion to dismiss the petition. The Third Department reversed. The petitioners—organizations that contract with OCA to represent children voluntarily placed outside the home under the Social Services Law—had standing to challenge OCFS’s Host Family Homes program. The petitioners sufficiently pleaded an injury in fact that is reasonably certain to occur; implementation of the program would place children outside of the home without the right to legal representation that the petitioners have a contractual obligation to provide. Further, this injury falls squarely within the zone of interests that the Social Services Law seeks to protect by providing for judicial oversight and mandated representation for the children. Proskauer Rose LLP (William C. Silverman, of counsel) represented the appellants.

[Matter of Lawyers of Children v NYS OCFS \(2023 NY Slip Op 03747\)](#)

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